On October 14, 1972 he filed an amended statement of claim purporting to have been done so under O.28 r.2 of the Rules of the Supreme Court, 1957. In the statement of claim, original or amended, he referred to two agreements, one dated June 10, 1972 and the other, dated September 14, 1972. The second agreement was referred to as a Dissolution Agreement setting out the terms for the dissolution of an alleged partnership between him and the first defendant, Sio Koon Lin, and which relates to the appointment of Mr. George Taye as Arbitrator with powers to appoint a qualified auditor to inspect the books of account of the alleged partnership. (See paragraph 7 of the Statement of Claim). In paragraph 8 it is stated —

"8. On or about the 20th day of September, 1972 the said George Taye acting as the Arbitrator and accompanied by one Allan Lim Aik an accountant called at the office of the partnership to inspect the account books but they were not made available to them. Subsequent attempts to obtain possession of all the accounts books for the said Allan Lim Aik's inspection met with no success."

This was followed by the prayers referred to above.

Both defendants filed a joint defence on October 14, 1972. They denied the existence of the alleged partnership. Although they admitted the second agreement dated September 14, 1972 they maintained that it is not in respect of a dissolution of partnership but a loan agreement.

On October 15, 1972 the plaintiff by summons in chambers applied for summary judgment under Order 14 of the Rules of the Supreme Court, 1957. This was opposed by the defendants who filed an affidavit showing cause under O.14 r.3. The affidavit was not sworn by the defendants themselves but by their solicitor, Mr. Bashir, who claimed that he had full knowledge of the facts relevant to the dispute even including those which could only be known to the defendants or either of them. On those facts it was maintained that there were triable issues. There was no complaint that the specially indorsed writ in this case is a nullity. Its nullity was raised more than a year later. By summons in chambers dated February 15, 1974 the defendants applied to have the action dismissed or struck out on the ground that the writ specially indorsed with a claim founded on an allegation of fraud is a nullity. At the hearing of this appeal Mr. Ball, counsel for the first appellant, said that but for the decision of Chang Min Tat J. in *Khong Kim Ching* v. *Hassan bin Din & Ors.*[1] in the High Court at Penang the application would not have been made.

The application was dismissed by Ibrahim J. who was of the view that the writ is not a nullity. The only ground of the present appeal is that the learned judge erred in coming to that view.

The question for consideration is whether the defendants are right in the view that the plaintiff's claim is founded on an allegation of fraud. In my judgment they are not right because it is clearly not so founded. The plaintiff's action arose out of the defendants' alleged failure to make available the books of account as stated in paragraph 8 of the statement of claim. Such failure would be a breach of the dissolution agreement dated September 14, 1972 as referred to in paragraph 6. The allegation of fraud is stated in paragraph 5 as follows:

"5. Sometime in August, 1972 the plaintiff discovered that the 1st defendant had on 27th July, 1972 fraudulently, dishonestly and in breach of the said Agreement registered a business known as 'Kingswood Timber Industries' with the defendant and one Lim Pat Luan the 2nd defendant (who was then employed as manager) as the partners thereof."

Thus stated it would be clear that the fraud alleged has nothing to do with the plaintiff's present cause of action which is based on an alleged breach of the said agreement dated September 14, 1972. Whether or not the first agreement dated June 10, 1972 had come to an end by reason of the first defendant's fraud is not, in my view, relevant to the present dispute. Even if fraud is relevant it is certainly not the basis of the plaintiff's claim. In view of this I do not find it necessary to express an opinion on the decision in *Khong Kim Ching* v. *Hassan bin Din & Ors.*[1] The Federal Court will no doubt consider it when the opportunity arises. If I may say so such opportunity did arise in a recent appeal† in which judgment was reserved.

The present appeal is, therefore, dismissed with costs. Deposit to the respondent towards payment of taxed costs.

Wan Suleiman F.J. and **Syed Othman J.** concurred.

Appeal dismissed.

Solicitors: *Humfrey Ball; Bashir & Co.; Mah Kok & Din.*

† *Tan Chwee Geok & Ors.* v. *Khaw Yen-Yen* (Suffian L.P., Lee Hun Hoe C.J. (Borneo) & Ali F.J., May 9, 1975 to be reported).

EMPLOYEES PROVIDENT FUND BOARD v. M.S. ALLY & CO. LTD.

[F.C. (Gill C.J. (Malaya), Raja Azlan Shah and Wan Suleiman F.JJ.) March 28, 1975]
[Kuala Lumpur — Federal Court Civil Appeal No. 12 of 1974]

Employees Provident Fund Ordinance, 1951 — Working partnership — Whether working assistants in company are employees — Whether they are under contract of service — Whether profits received by working assistants are wages — Whether contributions payable.

Provident Fund — Working assistants — Whether employees — Whether under contract of service — Whether profits received are wages.

The respondent company was a private company dealing in provisions, medical supplies and general merchandise. The business of the respondent company was conducted and managed by a group of persons known as working assistants who were rewarded by a share of the profits. All capital required by the business was provided by the company and all labour and skill in the conduct and management of the business were supplied by the working assistants. The two issues that were raised in this case were (1) whether the working assistants were employees within the meaning of the Employees Provident Fund Ordinance 1951, that is whether they were persons employed under a contract of service to work for an employer; and (2) whether even if the working assistants were employees within the meaning of the Ordinance, contributions were payable by them towards the Employees Provident Fund.

The learned trial judge held that the working assistants were not employed under a contract of service and he also held that no contributions were payable by them. The appellant appealed to the Federal Court.

Held: (1) the correct conclusion to be drawn from the evidence was that there was a sufficiency of control or that the working assistants were part and parcel of the organization; that they were employed as part of the business and their work was done as an integral part of and not as an accessory to the business. The working assistants were therefore under a contract of service and not a contract for service and they were employees within the meaning of the Employees Provident Fund Ordinance, 1951;

(2) what the working assistants receive each year were not wages as defined in the Employees Provident Fund Ordinance, 1951 and therefore contributions were not payable by them to the Employees Provident Fund.

Cases referred to:-

(1) *Queen* v. *Walker* (1858) 27 L.J. M.C. 207.

(2) *Yewens* v. *Noakes* (1880) 6 Q.B.D. 530.

(3) *Walker* v. *The Crystal Palace Football Club Ltd.* [1910] 1 K.B. 87, 92.

(4) *Templeton* v. *William Parkin & Co. Ltd.* (1929) 140 140 L.T.R. 519.

(5) *Montreal Locomotive Works Ltd.* v. *Montreal and Attorney-General for Canada* [1947] 1 D.L.R. 161.

(6) *Pauley* v. *Kenaldo Ltd.* [1953] 1 All E.R. 226.

(7) *Gould* v. *Minister of National Insurance* [1951] 1 All L.R. 368.

(8) *Short* v. *Henderson Ltd.* (1946) 62 T.L.R. 427.

(9) *Braddell* v. *Baker* (1911) 104 L.T.R. 673.

(10) *Denham* v. *Midland Employers Mutual Assurance Ltd.* [1955] 2 Q.B. 437.

(11) *Amalgamated Engineering Union* v. *Minister of Pensions and National Insurance* [1963] 1 W.L.R. 441.

(12) *Morren* v. *Swinton and Pendlebury Borough Council* [1965] 1 W.L.R. 576.

(13) *Market Investigations Ltd.* v. *Minister of Social Security* [1969] 2 W.L.R. 1.

(14) *Ready Mixed Concrete (South East) Ltd.* v. *Minister of Pensions and National Insurance* [1968] 1 All L.R. 433.

(15) *Cassidy* v. *Ministry of Health* [1951] 2 K.B. 343.

(16) *Queensland Stations Proprietary Ltd.* v. *Federal Commissioner of Taxation* (1945) 70 C.L.R. 539.

(17) *United States* v. *Silk* (1946) 331 U.S. 704.

(18) *Chye Hin Co. (Perak)* v. *Public Prosecutor* [1960] M.L.J. 137.

(19) *Bata Shoe Company (Malaysia) Ltd.* v. *Employees Provident Fund Board* [1967] 1 M.L.J. 120.

(20) *Benmex* v. *Austin Motor Co. Ltd.* [1955] A.C. 370.

(21) *Hobbs* v. *Royal Arsenal Co-operative Society* [1930] 144 L.T.R. 10.

(22) *Bank Voor Handel En Scheepraart N.V.* v. *Slatford* [1953] 1 Q.B. 248, 295.

(23) *Stevenson Jordan & Harrison Ltd.* v. *MacDonald & Evans* [1952] T.L.R. 101, 111.

(24) *Commissioner of Income Tax, Madras* v. *Mohamed Kassim Rawther* (1927) A.I.R. Mad. 1053.

CIVIL SUIT.

Chan Siew Yoon for the appellant.

Miss Chan Kah Leng for the respondent.

Wan Suleiman F.J.: The respondent company is a private company and by its articles of association the number of its shareholders is limited to fifty. It deals extensively in provisions, medical supplies and general merchandise. It has many branches in the State of Selangor.

The business of the respondent company was conducted and managed by a group of persons known as Working Assistants who were rewarded by a share of the profits. All capital required by the business was provided by the respondent company and all labour and skill in the conduct and management of the business were supplied by these Working Assistants. Learned counsel for the respondent described this arrangement as "a working partnership agreement", whereby one party contributed the capital and the other its labour and skill in running a joint business from year to year. The Working Assistants were either directors, managers, storekeepers, secretaries or accountants, each in charge of a branch or department.

The net profits of the business were distributed as follows: —

(a) 49% to the defendant company,

(b) 48½% to Working Assistants and

(c) 2½% to charity.

Should the defendant company suffer a loss in its business in any financial year the Working Assistants would get nothing for their efforts but the defendant company would bear all losses including any loss of capital.

Net profits were arrived at by pooling together profits and losses of all branches at the end of each financial year. The number of Working Assistants varied from year to year. A Working Assistant would not know the amount of his share of profits until the end of the financial year when the shares of all Working Assistants would then be ascertained in the following manner. Out of the 48½% share of profits payable to Working Assistants, 24% are shared by those who worked as managers, and the remaining 24½% was then shared by those performing other functions. At the end of each financial year the Board of Directors would allot each Working Assistant a "ratio" or multiplier, the highest being 2.75 and the lowest 1.75. This multiplier multiplied by the number of days he had worked during the year would give the units he had earned for a particular year. His share of the net profits would depend on the number of units so earned.

All the goods sold in the shop belong to the respondent company and all the shop premises are rented by the respondent company who pay the rent.

Apart from a share of the profit, the Working Assistants are provided with food and lodging, hairdressing and laundry services free of charge and are also given cash for the purpose of purchasing their breakfast daily.

The various branches of the respondent company as well as the head office open and close for business at fixed hours except during festive seasons when extension of business hours may be necessary. The respondent company's Board of Directors can engage and dismiss Working Assistants.

In his judgment the learned trial judge seems to labour under the misconception that Working Assistants employ or engage shop assistants. Mohd. Moideen did say so under cross-examination, but his superior, Abdul Wahab averred that they were servants and employees of the respondent company, so that if Working Assistants could indeed engage and dismiss them, it would only be as agents of the res-

pondent company. It is not in dispute that shop assistants were under the control and supervision of Working Assistants and were paid fixed salaries. Shop assistants, after some years' experience are eligible for promotion to the post of Working Assistants, whereupon their fixed monthly salary would cease to become payable.

The two issues before the learned trial judge were: —

(1) whether Working Assistants are "employees" within the meaning of the E.P.F. Ordinance 1951 (*i.e.* whether they are persons employed under a contract of service ... to work for an employer) and

(2) whether, even if Working Assistants are "employees" within the meaning of that Ordinance, contributions are payable by them (towards the Employees Provident Fund).

For the purposes of this appeal it will be convenient to reverse the order in which his Lordship considered these issues, *i.e.* to begin by examining the first issue.

The learned trial judge examined a number of authorities, and it will be appropriate to quote that part of his judgment in extenso: —

"In *Queen* v. *Walker*,[1] which was a Crown Case Reserve adjudged by five judges, Bramwell B. said that: —

The difference between the relations of master and servant and of principal and agent is this: —

A principal has the right to direct what the agent has to do; but a master has not only that right, but also the right to say how it is to be done."

In *Yewens* v. *Noakes*,[2] Bramwell L.J. reiterated what his Lordship had said 22 years earlier that: —

"A servant is a person subject to the command of his master as to the manner in which he shall do his work."

These general principles of control for determining the question whether a contract of service or for service are reflected in a passage in the *Halsbury's* Laws of England, Third Edition, Volume 25, page 452 which reads: —

"In general the distinction between a contract of service and a contract for work and labour or for services is similar to that which exists between a contract of service and a contract of agency, namely, that in the case of a contract of service the master not only directs what work is to be done but also controls the manner of doing it, whereas, in the case of a contract for work and labour or a contract for services the employer is entitled to direct what work is to be done, but not to control the manner of doing it."

In *Walker* v. *The Crystal Palace Football Club Ltd.*[3] it was argued in 1910 perhaps for the first time that there was a difference between an ordinary workman and a man who had contracted to exhibit and employ his skill where the employer would have no right to dictate to him in the exercise of that skill, *e.g.* the Club in this case would have no right to dictate to him (a footballer) how he should play football, Lord Cozens-Hardy M.R., disagreeing with such argument said: —

"I am unable to follow that. He is bound according to the express terms of his contract to obey all general directions of the club, and I think in any particular game in which he was engaged he would also be bound to obey the particular instructions of the captain or whoever it might be who was the delegate of the authority of the club for the purpose of giving those instructions. In my judgment it cannot be that a man is taken out of the operation of the Act simply because in doing so a particular kind of work which he is employed to do, and in doing which he obeys general instructions, he also exercises his own judgment uncontrolled by anybody."

In *Templeton* v. *William Parkin & Co. Ltd.*[4] it was held that: —

"having regard to the absence of control or supervision of Templeton's work by the appellants, Templeton was acting as an independent contractor."

In *Montreal Locomotive Works Ltd.* v. *Montreal and A.-G. for Canada*[5] Lord Wright in 1947 held that in the past a single test, such as the presence or absence of control had been relied upon by the courts to determine the relationship of master and servant. In the more complex conditions of modern industry more complicated tests have often to be applied and

"In many cases the question can only be settled by examining the whole of the various elements which constitute the relationship between the parties. In this way it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior."

In *Pauley* v. *Kenaldo Ltd.*[6] Lord Birkett L.J. in 1953 quoted with approval the following judgment of Ormerod J. in *Gould* v. *Minister of National Insurance*:[7]

"In *Short* v. *Henderson Ltd.*[8] a case in the House of Lords under the Workmen's Compensation Acts, Lord Thankerton .... recapitulates with approval the four indicia of contract of service derived by the Lord Justice-Clerk from authorities referred to by him. These are: —

(a) the master's power of selection of his servant;

(b) the payment of wages or other remuneration;

(c) the master's right to control the method of doing the work; and

(d) the master's right of suspension or dismissal.

He goes on to say that the particular requirement of a contract of service is the right of the master in some reasonable sense to control the method of doing the work, and that this factor of superintendence and control has frequently been treated as critical and decisive of the legal quality of the relationship."

"In the case now before me the defendants selected the plaintiff (a cloak-room attendant in a restaurant). There was remuneration solely by tips.... The defendants could suspend or dismiss the plaintiff, but, in my opinion, they did not control the manner in which the work should be done. The plaintiff was not obliged to 'clock in' as other workers were.... She could stay away when she pleased and provide and pay for a substitute or an assistant, and, though the defendants required the work to be done, they did not control the manner in which it was to be done. I have come to the conclusion on all the facts of this case that there was no contract of service between the plaintiff and the defendants...."

In *Braddell* v. *Baker*[9] it was held that if an employee could delegate another man to do his work, then that was not a contract of service but a contract for service. Hamilton J. at page 676 said: —

"The jobbing gardener in this case, if he could not come on any date, was to send a qualified substitute. A servant contracts to render personal service, and if illness or other lawful excuse prevents his rendering personal service, he commits no breach of contract by his absence and is not bound to find a substitute; whereas a tradesman who contracts that a certain result shall be obtained — namely, a garden kept in order — may break his contract unless somebody keeps it in order.

That is why this man Taylor was at liberty, if he could not come, to send a qualified substitute, and so procure the performance of his contract, which was to have some gardening done."

In *Denham* v. *Midland Employers Mutual Assurance Ltd.*,[10] one Eastwood lent his labourer Clegg to Le Grands. Clegg was killed in an accident. The question is whether Clegg was under the contract of service with Le Grands or did he remain a servant of Eastwood. Eastwood simply told Clegg to go and do some particular work for the temporary employer (Le Grands). Denning L.J. said: —

"It (transfer) only applies when the servant is transferred so completely that the temporary employer has the right to dictate, not only what the servant is to do, but also how he is to do it."

In *Amalgamated Engineering Union* v. *Minister of Pensions and National Insurance*[11] Megaw J. said in 1963: —

"In my view, and I think this is supported by the authorities, the question of control of the employee is an important element in deciding whether or not the contract is a contract of service but it is a test or criterion which is far from being an absolute one. The nature of the control which is required in order to bring the employment within the scope of a contract of service varies almost infinitely with the general nature of the duties involved. ... Here I think, having regard to the detail in which the sick steward's duties are defined in rule 8, clauses 4 and 5, it is a case where the control of the employer is sufficiently extensive to bring the case within the category of contract of service rather than contract for services. I think anyone reading these rules as a whole would more reasonably take the view that the relationship established here is the relationship of master and servant than of employer and independent contractor."

In *Morren* v. *Swinton and Pendlebury Borough Council*[12] a case decided in 1965, Lord Parker C.J. said: —

"The cases have over and over again stressed the importance of the factor of superintendence and control (in a contract of service) but that it is not the determining test is quite clear. .... superintendence and control cannot be the decisive test when one is dealing with a professional man or a man of some particular skill and experience."

In *Market Investigations Ltd.* v. *Minister of Social Security*[13] in 1969 Cooke J. after referring to various authorities pointed out at page 8D that: —

"The first condition which must be fulfilled in order that a contract of service is that stated by MacKenna J. in the *Ready Mixed Concrete case*,[14] namely that A agrees that, in consideration of some form of remuneration, he will provide his own work and skill in the performance of some service for B. The fact that this condition is fulfilled is not, however, sufficient. Further tests must be applied to determine whether the nature and provisions of the contract as a whole are consistent or inconsistent with its being a contract of service."

In dealing with the question of control His Lordship further said at page 8F that: —

"There was at one time a school of thought according to which the extent and degree of the control which B was entitled to exercise over A in the performance of the work would be a decisive factor. However, it has for long been apparent that an analysis of the extent and degree of such control is not in itself decisive."

After reviewing the various authorities including *Cassidy* v. *Minister of Health*,[15] *Morren* v. *Swinton and Pendlebury Borough Council*,[12] *Queensland Stations Proprietary Ltd.* v. *Federal Commissioner of Taxation*[16] and *United States* v. *Silk*,[17] his Lordship came to the conclusion that: —

"The most that can be said is that control will no doubt always have to be considered although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task."

In *Ready Mixed Concrete (South East) Ltd.* v. *Minister of Pensions and National Insurance*[14] MacKenna J. at page 439 said: —

"I must now consider what is meant by a contract of service. A contract of service exists if the following three conditions are fulfilled: —

(i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.

(ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.

(iii) The other provisions of the contract are consistent with its being a contract of service. ...

As to (i). There must be a wage or other remuneration. ... The servant must be obliged to provide his own work and skill. Freedom to do a job either by one's own hands, or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be. ... As to (ii). Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when, and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted. ...
The third and negative condition is for my purpose the important one, ..."

His Lordship then gave five illustrations, after which he continued: —

"I can put the point which I am making in other words. An obligation to do work subject to the other party's control is a necessary, though not always a sufficient, condition of a contract of service. If the provisions of the contract as a whole are inconsistent with its being a contract of service, it will be some other kind of contract, and the person doing the work will not be a servant."

There are two Malayan cases, one decided in 1960 and the other in 1967 dealing with the question of contribution under the Employees Provident Fund Ordinance 1951.

In *Chye Hin Co. (Perak) Ltd.* v. *Public Prosecutor*,[18] the headnotes read: —

"The Employees Provident Fund Ordinance applies only to contract of service; it does not apply to the independent contractor. To distinguish between an independent contractor and a servant one of the tests is whether or not the employer retains the power, not only of directing what work is to be done, but also of controlling the manner of doing the work."

The company was the owner of a sawmill. Four sawyers worked for them and were paid at the end of each month on the total tonnage of timber sawn by them. The question was whether they were employees within the meaning of the Employees Provident Fund Ordinance 1951 or were they merely members of a partnership which had collectively contracted with the company. If the former, contributions to the Employees Provident Fund would be payable and if the latter, they would not. The four sawyers used the company's saw, worked in the company's premises and the logs and sawn planks belonged to the company. The company had no right of control over the sawyers' work or their manner of working but could reject any

timber not properly sawn. If any of the sawyers fell ill a substitute could be appointed to take his place without the need of obtaining any permission from the company. The four sawyers could be dismissed as a team. On these facts Smith J. said: —

"Looking at the facts of this case as a whole, I cannot agree that the prosecution has proved that a contract of service exists between the company and each of the sawyers. To distinguish between an independent contractor and a servant one of the tests is whether or not the employer retains the power, not only of directing what work is to be done, but also of controlling the manner of doing the work. I cannot find in this particular case any evidence that the person doing the work could be overlooked and directed in regard to the manner of his doing the work."

He held that (1) On the facts it was a collective contract with a partnership and not individual contracts. (2) The sawyers were not employed by the company under a contract of service and therefore the company were not liable to pay contributions to the Employees Provident Fund Board in respect of the sawyers.

In *Bata Shoe Co. (Malaysia) Ltd.* v. *Employees Provident Fund Board*,[19] Gill J. as he then was, said: —

"The sole question to be decided in this case is whether there is a relationship of employer and employee between the plaintiff company and the salesmen employed by the shop managers to assist them in carrying on the business in the company's retail shops. An 'employee' is defined under section 2 of the Employees Provident Fund Ordinance, 1951 as 'any person ... who ... is employed under a contract of service ... to work for an employer.' The word 'employer' is defined in the same section as a 'person with whom an employee has entered into a contract of service and includes (a) the manager, agent or person responsible for the payment of salaries or wages to an employee.' A contract of service is one in which a person undertakes to serve another and to obey his reasonable orders within the scope and the duty of the undertaking. Whether or not a particular contract is a contract of service is a question of fact, depending upon the terms of the engagement, the method of remuneration, and the power of controlling and dismissing the workmen, although none of these factors is by itself conclusive."

After quoting the four indicia approved by Lord Thankerton in the House of Lords case of *Short* v. *J. & W. Henderson Ltd.*,[8] Gill J. continued: —

"It is to be observed that the relationship of master and servant is characterized by a contract of service, express or implied, between the master and the servant. A contract of service is to be distinguished from a contract for services because a person who contracts to provide services for another person is not a servant but an independent contractor. To distinguish between an independent contractor and a servant, the generally accepted test is whether the employer retains the power, not only of directing what work is to be done, but also of controlling the manner of doing the work."

After having found *inter alia* that the plaintiff did not select the salesmen for appointment, did not pay their wages, had no direct control over the manner in which the work was to be performed or over their suspension or dismissal or over their working hours or the period of absence from the shop, Gill J. held there was no relationship of employer and employee within the meaning of the Employees Provident Fund Ordinance 1951 between the plaintiff company and the salesmen and contribution to the Fund was not payable in respect of the salesmen."

On the question whether in the present case there existed a relationship of master and servant between the parties or whether the respondent company had any right of control over Working Assistants or over their work or over the manner of their doing it or over such matters as their working hours, leave, termination of service and substitution of another Working Assistant for one going on leave, the trial judge accepted the evidence of Inche Mohd. Moideen and Inche Abdul Wahab.

Inche Mohd. Moideen was a Working Assistant in charge of the largest branch of the respondent company's organisation and Inche Abdul Wahab was the Managing Director of long standing. These witnesses impressed his Lordship as being honest and truthful. Therefore on all important issues he accepted their evidence in preference to that of the appellant's only witness Inche Mohd. Ebrahim, who his Lordship said, appeared to have an axe to grind and an interest to serve.

Accordingly he found as a fact the following and I quote: —

"The working-assistants could leave the shop at any time without getting anyone's permission and they were not required to keep regular working hours. They came and went at will. The defendant company had no right of control over the working-assistants or over their work or over the manner of doing it or over their working hours. The working-assistants took no orders or instructions from the defendant company in the running of the business. Any of the working-assistants could take leave to go to India for periods from one to twelve months without obtaining permission from the defendant company, although such absence might decrease his share of the profits and increase those of the other working-assistants. The distribution of 48½% of the net profits to the working-assistants would always remain constant. The working-assistants have the right to appoint substitutes to take over their work when they went on leave. If they could not find a substitute they would merely notify the directors who would then arrange for a substitute. Any of the working-assistants could terminate his contract by giving to the defendant company one month's notice but he could not get his share of the profits before the end of the financial year. His name would remain on the list of working-assistants until the shares of all the working-assistants including his for that year shall have been ascertained. In the ensuing financial year his name would then be omitted. Similarly the defendant company could terminate the contract by giving to any of the working-assistants three months' notice. In operating the business the working-assistants worked as much for themselves as for the defendant company. Both parties carried out this joint business for their joint account and if there were profits they shared them and if there was none they got nothing. They were not paid any salary or wages. Lastly the defendant company has no right to transfer any of the working-assistants from one branch or department to another without his express consent."

In the event his Lordship held that all these important elements as a whole are inconsistent with the contract being a contract of service, and concluded that it was a contract of some kind other than a contract of service. I would take this to mean that such contract would then be a contract *for services*.

The essence of appellant's criticism of his decision is that certain findings of the learned trial judge are against the weight of evidence, and that in arriving at a finding of fact that this is a contract of service, his Lordship had drawn the wrong inference; and that his Lordship had misconceived the law as regards the "control" test.

As I have stated earlier his Lordship had made it abundantly clear why he had accepted the evidence of the two witnesses called by the respondent company, Mohd. Moideen and Abdul Wahab, and rejected that of Mohd. Ebrahim, appellant's sole witness.

Following the principle laid down in *Benmex* v. *Austin Motor Co. Ltd.*,[20] I would be most reluctant to differ from a finding of fact by the learned trial judge who has seen and heard these witnesses unless it can be shown that he had misdirected himself on the evidence, to have rejected evidence for wrong reasons, or to have drawn an inference from evidence which was equally capable of supporting a different inference.

I propose to examine the evidence accepted by his Lordship in terms of the four indicia of contract of service approved in *Short* v. *Henderson, supra,* viz.

(a) the master's power of selection of his servant;

(b) the payment of wages or other remuneration;

(c) the master's right to control the method of doing the work; and

(d) the master's right of suspension or dismissal.

What power then has the respondent company to select Working Assistants if any?

Mohd. Moideen said that in 1957 he was promoted from shop assistant to Working Assistant. Such promotion he said (at page 51) depends on experience, sincerity, honesty, loyalty, length of service, hard work and business acumen.

Abdul Wahab (at page 55) also refers to the transistion from shop assistant to Working Assistant as a promotion.

In the Statement of Agreed Facts, it is agreed that the respondent company's Board of Directors could engage (and dismiss which incidentally is the answer to (d) above) Working Assistants.

There can be no doubt whatsoever that the respondent company, therefore, selected Working Assistants.

As regards (b), share of the profits is the remuneration which Working Assistants once selected opt for in preference to a fixed salary, probably because there is, (in the words of Abdul Wahab), a chance that he would get more money thereby.

There thus remains for examination the question of the right to control, by the respondent company, of the method of doing work of Working Assistants.

At the very best, I would say with respect the trial judge would be correct in concluding, from the evidence of DW1 that there was a certain laxity in the control the Board of Directors had over Working Assistants because the latter occupied managerial positions and have considerable experience, for control both direct and indirect undeniably exist.

One instance is the indirect form of control the Board of Directors had in alloting the "ratio" each year which determines how much a Working Assistant will earn. Again a Working Assistant can be dismissed for dishonesty with or without notice. If a Working Assistant misappropriated company's funds or was disloyal, the Managing Director could warn him or terminate his services by notice.

Yet again according to the Statement of Agreed Facts, the Board of Directors could engage and dismiss Working Assistants.

Other indirect forms of control are the requirement that permission should be obtained by a Working Assistant to overdraw moneys from his "account" *i.e.* moneys due to him in the keeping of the company, and the need to inform the Managing Director before he could go away on long leave.

As regards the absence of set hours of work, this seems in my view to be consistent with the general pattern of laxity of control over managerial staff, without a complete abrogation of the right of control. After all, as learned counsel for the appellant has submitted, there is sufficient power vested in the company to deal with the situation where a Working Assistant chose to over-exercise this right, by way of warning, reduction of the annual "ratio" which should mean reduction in income, and finally dismissal.

Again the absence of set hours is quite usual in relation to a contract of service: see *Amalgamated Engineering Union* v. *Minister of Pensions and National Insurance*;[11] *Market Investigations Ltd.* v. *Minister of Social Security*;[13] *Hobbs* v. *Royal Arsenal Co-operative Society*.[21]

The learned trial judge also considered the question of leave in regard to which there is evidence that Working Assistants have the right to appoint substitutes to take over their work during their absence. Such leave they could obtain without permission from the company for periods ranging from one to twelve months, the only result of prolonged leave being decrease in their share of profits. There is also evidence that where they could not find a substitute they would merely notify the directors who would then arrange for a substitute.

His Lordship clearly had in mind the case of *Braddell* v. *Baker, supra.* It will suffice for me to say that whilst in that case the jobbing gardener who contracted to keep a garden in order would be committing a breach of contract for services if he was unable to do so in person or by substitute, the proper inference to be drawn from the necessity rather than the right of a Working Assistant to find a substitute is that such arrangement for a substitute is a matter of good administration. It is not therefore a case of a Working Assistant having to hire a helper to do his work during his absence, for it should not be overlooked that such a substitute must necessarily be another Working Assistant of the respondent company.

It is not disputed that the respondent company had the right to dismiss Working Assistants, and it would be pertinent to mention that the right of dismissal indicates a contract of service rather than a contract for services: see *Short* v. *J. and W. Henderson Ltd.*[8]

It seems to me the traditional control test, based on the simpler socio-economic conditions of a by-gone age must indeed be modified if it is to be valid.

I am fortified in my view by an interesting note entitled "Servants and Independent Contractors" by O. Kahn-Freund (*Modern Law Review* 1950, Vol 14 pages 504 to 511). The passage cited below will I think enable us to follow the trend of the present development in this branch of the law:

"The traditional test was that a person working for another was regarded as a servant if he was 'subject to the command of the master as to the manner in which he shall do his work', but if the so-called 'master' was only in a position to determine the 'what' and not the 'how' of the services, the substance of the obligation but not the manner of its performance, then the person doing the work was said to be not a servant but an independent contractor, and his contract one for work and labour and not of employment. This distinction was based upon the social conditions of an earlier age: it assumed that the employer of labour was able to direct and instruct the labourer as to the technical methods he should use in performing his work. In a mainly agricultural society and even in the earlier stages of the Industrial Revolution the master could be expected to be superior to the servant in the knowledge, skill and experience which had to be brought to bear upon the choice and handling of the tools. The control test was well suited to govern relationships like those between a farmer and an agricultural labourer (prior to agricultural machanisation), a craftsman and a journeyman, a householder and a domestic servant, and even a factory owner and an unskilled 'hand'. It reflects a state of society in which the ownership of the means of production coincided with the possession of technical knowledge and skill and in which that knowledge and skill was largely acquired by being handed down from one generation to the next by oral tradition and not by being systematically imparted in institutions of learning from universities down to technical schools. The control test postulates a combination of managerial and technical functions in the person of the employer, i.e. what to modern eyes appears as an imperfect division of labour. The technical and economic developments of all industrial societies have nullified these assumptions. The rule respondeat superior (and, one may add, the whole body of principles governing the contract of employment) 'applies even though the work which the servant is employed to do is of a skilful or technical character, as to the method of performing which the employer himself is ignorant'. To say of the captain of a ship, the pilot of an aeroplane, the driver of a railway engine, of a motor vehicle, or of a crane that the employer 'controls' the performance of his work is unrealistic and almost grotesque. But one need not think of situations in which the employee is physically removed from his employer's premises: a skilled engineer or toolmaker, draftsman or accountant may as often as not have been engaged just because he possesses that technical knowledge which the employer lacks. If in such a case the employee relied on the employer's instructions 'how to do his work' he would be breaking his contract and possibly be liable to summary dismissal for having misrepresented his skill. No wonder that the courts found it increasingly difficult to cope with the cases before them by using a legal rule which, as legal rules so often do, had survived the social conditions from which it had been an abstraction. The judyments in *Mersey Docks and Harbour Board* v. *Coggins & Griffiths*, show plainly enough that the control test had to be transformed if it was to remain a working rule and to be more than a mere verbal incantation."

Denning L.J. in his inimitable style, has stressed this need for modification of the law in a somewhat different manner. In *Bank Voor Handel En Scheepraart N.V.* v. *Slatford*[22] his Lordship said:

"The test of being a servant does not rest nowadays on submission to orders. *It depends on whether the person is part and parcel of the organisation.*"

In *Stevenson Jordan & Harrison Ltd.* v. *MacDonald & Evans*[23] Denning L.J. repeats:

"It is often easy to recognise a contract of service when you see it but difficult to say wherein the difference lies. A ship's master, a chauffeur and a reporter on the staff of a newspaper are all employed under a contract of service; but a ship's pilot, a taxi-man and a newspaper contributor are employed under a contract for services. One feature which seems to run through the instances is that, *under a contract of service, a man is employed as a part of the business and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.*"

A somewhat similar approach was taken by Cooke J. in *Market Investigations Ltd.* v. *Minister of Social Security*.[13] The appellant company, which was engaged in the field of market research, employed interviewers to obtain information about the opinions of members of the general public and others in industry and the professions. The company drew from a panel of about 470 interviewers. All prospective interviewers received a copy of the company's "Interviewer's Guide" giving instructions as to how they should be carried on. There was, however, no obligation on a panel member to accept an offer, and she was also free to work for other firms during the same period. Once the interviewer was working in the field, the supervisor had no means of contacting her.

The Minister of Social Security held that Mrs. I., who was on the company's panel and worked for more than eight hours a week for fourteen weeks at various rates of pay, was an employed person under the Insurance Acts. The company appealed on the ground that she was engaged under a series of separate contracts for services whenever she accepted an offer to interview persons whose names had been sent to her by the company.

It was argued for the appellant that the correct test by which to distinguish between a contract of service and one for services was whether the master had the right to control the method of doing the work. In the instant case the company could not require Mrs. I. to interview any of the persons named by it, nor could it instruct her how her work was to be done. Nor did the contracts with her make any provision for sick pay or holidays or for dismissal.

Cooke J. held that none of these matters was decisive. The right to control was evidence of service but not an essential part. He held that "the fundamental test to be applied is this: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?' If the answer to that question is 'yes' then the contract is a contract for services. If the answer is 'no', then the contract is a contract of service." It is obvious that Mrs. I. was not in business on her own account so that her contract (or contracts) with the company was one of service.

In the latter part of his judgment (at page 101) the learned trial judge remarked "In operating the business the Working-Assistants worked as much for themselves as for the defendant company. Both parties carried out this joint business for their joint account and if there were profits they shared them and if there was none they got nothing. They were not paid any salary or wages." Earlier in his judgment he had adopted the term used by counsel for the respondent company and described this arrangement as a "working partnership". There was of course no suggestion by either side that this arrangement was a form of partnership known to law.

It would appear that the concept of "working partnership" is not unknown to Indian law. In his commentary on the Indian Partnership Act, 1932 Second Edition at page 38, Aggarawala states, "A working partnership is *not* (the italic is mine) necessarily a partner in the business. He may be merely an employee under the capitalist partner although the work-

ing partner is to get a share in the net profits as remuneration for the services rendered by him..."

I would with respect say that having considered the evidence, the correct conclusion to be drawn is that there is a sufficiency of control or if one is to apply the test employed by Denning L.J. in *Bank Voor Handel En Scheepraat N.V.* v. *Slatford* and *Stevenson Jordan & Harrison Ltd.* v. *MacDonald,*[22] Working Assistants are "part and parcel" of the organisation; that they are employed as part of the business and their work is done as integral part of and not as an accessory to the business. I would therefore hold that Working Assistants are under a contract of service and not a contract for services, and the metamorphosis from shop assistants to Working Assistants with the consequent change in mode of remuneration does not alter this fact. My answer therefore to the first issue (and it would be safe to assume bearing in mind the definition of "employee" in the Ordinance that no one would be precocious enough to be made a Working Assistant until he is well past the age of 16 years) would be in the positive.

The next issue is whether contributions are payable under the Ordinance.

That part of the learned trial judge's judgment dealing with this very point is as follows: —

"Section 7(1) upon which plaintiffs relied for their claim reads: —

'7. (1) Subject to the provisions of section 16 of this Ordinance, every employee and every employer of a person who is an employee within the meaning of this Ordinance shall be liable to pay monthly contributions at the rate respectively set out in the Third Schedule to this Ordinance:

Provided that the Board may, at its discretion and on such terms and conditions as it may impose, authorise an employer, or a class or classes of employers, to pay such contributions at intervals of three months.'

Under this sub-section it is imperative that the employer and employee shall pay the contributions monthly and at the longest at intervals of three months. Such contributions are clearly based on monthly wages. This interpretation appears to be reinforced by the Third Schedule and particularly by the words 'Amount of wages for the month'. Because of its importance to this case, it is set out below in full.

'THIRD SCHEDULE
(Section 7)

Amount of wages for the month	Rate of contribution for the month	
	By the employee	By the employer
When the wages do not exceed $10	... Nil	... Nil
When the wages exceed $10 but not $ 30	... 1.50	... 1.50
When the wages exceed $30 but not $ 40	... 2.00	... 2.00
When the wages exceed $40 but not $ 50	... 3.00	... 3.00
When the wages exceed $50 but not $ 60	... 3.50	... 3.50
When the wages exceed $60 but not $ 70	... 4.00	... 4.00
When the wages exceed $70 but not $ 80	... 4.50	... 4.50
When the wages exceed $80 but not $ 90	... 5.00	... 5.00
When the wages exceed $90 but not $100	... 5.50	... 5.50

and for months when the wages exceed $100, the rate of contribution by the employee and the rate of contribution by the employer shall each be $1 for every $20 or part of $20 of the amount of wages for the month.'

Sub-section (6) of section 7 which reads: —

'(6). In the event of the death of an employee, no contribution shall be due under this section by or on behalf of suuh employees in respect of the month during which such death occurs.'

would appear to further strengthen the interpretation that this Ordinance applies only to persons in receipt of monthly wages.

In my view it would be impossible for the defendant company or the working-assistants to comply with section 7(1) and in particular with the Third Schedule because they were never paid monthly wages or any wages at all. They would not know the amount of their share of the profits until the end of the financial year when the profits and losses of all the branches would be pooled together to ascertain whether there was any net profit. Even then, they would not know the amount of the profits due to each of them until after the ratios and shares of all the working-assistants shall have been ascertained. If there was no profit they would not get anything at all.

In my opinion the provisions of the Employees Provident Fund Ordinance 1951 as they now stand, are never intended to apply and I hold that they do not apply to agreements like the present one...."

I would with respect add that I am in entire agreement with his Lordship here. It may be argued that the definition in the Ordinance that "wages" means the remuneration in money due to the employee under his contract of service or apprenticeship whether to be paid monthly, weekly, daily or otherwise would include the payment of a share in the net profits at the end of each financial year. I am satisfied that the ejusdem generis rule if applied could not produce such an absurd result. I would respectfully agree with the learned trial judge that what Working Assistants received each year are not wages as thus defined.

Whilst it would appear as his Lordship remarked that this system of profit sharing cannot be said to be a blatant attempt to circumvent the Ordinance and indeed appears to be a well established mode of remuneration which preceded the advent of the Ordinance as is evidenced by the case of *Commissioner of Income Tax Madras* v. *Mohd. Kassim Rawther,*[24] I do not feel called upon to suggest what remedy the appellant Board should resort to in the present circumstances.

My answer to the second issue would therefore be in the negative. Accordingly I would dismiss this appeal with costs.

Deposit to respondent to account of taxed costs.

Gill C.J. (Malaya) and **Raja Azlan Shah F.J.** concurred.

Solicitors: *Shook Lin & Bok; Skrine & Co.*